

# RIGHTS OF MATERIAL TEST ON GOVERNMENT REGULATION IN LIEU OF LAW IMPLEMENTATION

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## ABSTRACT

A test on a law conducted by the Constitutional Court is not only always related to the substance of a law but it can also associate with the formation process of the law. This means that Constitutional Court tests a law both materially and formally. Testing on other regulations under legislation such as government regulation, Regulation of the President, and others carried out by the Supreme Court based on the Supreme Court Regulation Number 1 of 1999 on the Material Testing lawsuit. Especially on Government Regulation in Lieu of Law (Government Regulation), cannot be tested either by the Supreme Court and the Constitutional Court as it is temporary. The tests are carried out by non-justicial institution that their title depen on the institution that has the authority to conduct such testing. . This study uses the methodology of normative juridical deduction, the judicial approach. At the end of the discussion will be found the answer from the legal issues that the law of the State Administrai important role in the prevention and eradication of corruption. With prescriptions for a legal solution

**Keywords:** judicial rights, government regulation, lieu of law.

## INTRODUCTION

Amendment of 1945 Constitution has led to a change of Indonesia government system from power-sharing system (distribution of power) into separation of powers system. With the changes to Indonesia government system, authority to conduct testing (judicial review) a legislation emerges. The problem appears on what institutions are authorized to conduct test of an Act of the Constitution (Judicial Review) carried out by the Constitutional Court, which by the amendment of the 1945 Constitution, the Constitutional Court becomes one of the powers of Justice in addition to the Supreme Court, this is stipulated in Article 24 paragraph (2) of the 1945 amendment 4 stating that: "Judicial Authority is carried out by a Supreme Court and courts below it in general courts, military courts, administrative courts state and by a Constitutional Court."

The provisions of Article 24 paragraph (2) of the 4<sup>th</sup> 1945 constitution amendments places Constitutional Court as one of the power-holders in addition to the Supreme Court of Justice, followed up with the establishment of Law Number 24 of 2003 concerning the Constitutional Court. One of the Constitutional Court's authority as provided in Article 10 paragraph (1) of Act Number 24 of 2003 is the authority of the Constitutional Court in testing an Act against the Constitution.

Tests conducted by the Constitutional Court Act Number 24 of 2003 is limited to testing whether the material and the creation of a law complies with the Constitution, while the testing of

the other regulations under legislation such as government regulation, Regulation of the President, and others are carried out by the Supreme Court based on the Supreme Court Regulation Number 1 of 1999 on the Material Testing lawsuit.

Only for Government Regulation in Lieu of Law (Government Regulation), this rule cannot be tested either by the Supreme Court and the Constitutional Court as it is a legal product in special form and is temporary.

## DISCUSSION

According to the provisions of Article 7 of Act Number 12 of 2011 on the Establishment of Legislation, the order for the legislation in Indonesia are:

- a. Constitution of the Republic of Indonesia` Year 1945.
- b. MPR
- c. Law/Government Regulation in Lieu of Law.
- d. Government regulations.
- e. President decree.
- f. Local regulation.

The order for the legislation in Indonesia shows which regulations are under the law, on par with the legislation, and higher than legislation. Government Regulation, Presidential Regulation, and Local Regulations are regulations whose level is under the law when tested carried out by the Supreme Court by using the size of the law. However, the authority to conduct tests on law

Constitutional Court and its measurement is Constitution. Government Regulation in Lieu of Law (Government Regulation) cannot be tested either by the Supreme Court and the Constitutional Court for it is temporary. Perpu is a legal product which is the object of examination by the Parliament as an institution of the legislators, in other words the Government Regulation in Lieu of Law cannot be subject to Judicial Review but can only subject to legislative review by the House of Representatives as stipulated in Article 22 paragraph (1), (2), and (3) of the 1945 Constitution:

1. In matters of forcing, the President has the right to issue government regulation in lieu of law.
2. The regulations that must be approved by the House of Representatives in the trial that follows.
3. In absence of approval, the government regulations shall be revoked.

There are three kinds of legal norms that can be tested, namely:

- a. Normative decision which contains and is the setting (Regeling).
- b. Normative decision containing administrative determination and character (beschikking).
- c. Normative decision which contains and is judgment (verdict) (Asshiddiqie, 2006)

All three forms of the norms are verifiable through judicial mechanism (justicial) and the mechanisms outside the court (non-justicial). If the test are carried out by the judiciary, the test is referred to as a Judicial Review, whereas if such testing was not conducted by a non-justicial then the terms depend on what the institution has authority to conduct such testing.

Constitutional Court only conducts test a law against the Constitution, in terms of both formal and in terms of the Material. In assessing the constitutionality or, some gauges or assessors are used:

- a. The manuscript of the Constitution that formally written.
- b. Written documents associated with the text of the Constitution, as treatises, decisions and MPR decrees, certain laws, regulation rules, and others.
- c. The values of the Constitution that live in the practice of state administration has been regarded as an integral part of the necessity and habit in the implementation of the activities of the state.
- d. The values that live in society cognitive state and the reality of political behavior and legal citizens considered as habits and ideal necessities in the life of nation and state.

Thus the notion of constitutionality is not only in what is written in the script of 1945

institution, but also includes all four points included in the source of constitutional law.

In theory regarding testing (teosting), it can be divided into test material (material teosting) and a formal review (formeeleteosting). Both forms of the test in the Act Number 24 of 2003 on the Constitutional Court are distinguished in terms of the formation of legislation and the substance of legislation, as stated in Article 51 paragraph (3): "In the application referred to in paragraph (2), the applicant must describe clearly that:

- a. Establishment of legislation does not comply with the provisions by the Constitution of the Republic of Indonesia Year 1945; and / or
- b. The substances of the paragraph, chapter, and/or parts of law are considered to be contrary to the Constitution of the Republic of Indonesia Year 1945.

The provisions of the Article indicates that test against a law is not only always related to the substance of a law, but also be associated with the formation process of the law.

Material law test is so-called substantive testing related to the cancellation of part or all of the material related laws. Reason for canceling the entire legislation that testing is if the testing material from an article of the law that were tested are substantial and affect the whole body of law, thus with with cancellation of the core article of testing then, law becomes damaged and create legal uncertainty in the future. The example is judicial review is Act Number 20 of 2005 on Electricity. The cancellation of three chapters considered contrary to the 1945 Constitution are core clauses that Constitutional Court stated that the entire contents of the declared the law was not legally binding.

Formal review (formelteosting) is a test or a law based on terms of form, format, and formulation as well as the formation process of the law. Formal review of the legislation causes the whole law can be declared valid binding. In general criteria that can be used to assess the constitutionality of a statute is the formal terms of the extent to which these laws are set in the right shape, the right institution, and according to proper procedures. If translated, formal testing criteria include:

- a. Tests on the implementation of the procedure or procedures for drafting legislation, both in discussion and in decision-making on the draft of a statute into law.
- b. Tests on the form, format, or s structures are at legislation.
- c. Tests relating to the authority of institutions that make decisions in the process of establishing legislation.
- d. Tests on other matters that do not include material testing. (Indonesia, 2005)

Regarding the procedure for the establishment of a law, in essence, has been set in 1945, and details about it are further specified in the Law, No. 12 of 2011 on Government Legislation. *Judicial Review* is on the Constitutional Court.

Act Number 24 of 2003 on the Constitutional Court governs procedural law as guidance for the Constitutional Court in carrying out its various authorities, one of which is the authority to conduct testing of a law against the Constitution (*Judicial Review*). Such provisions governing the mechanism of filing a petition for judicial review, inspection testing of a law in the Constitutional Court was the subject of law which meets the requirements under the legislation to apply constitutional cases to the Constitutional Court, by way of proving that it has a legal status (*legal standing*) so that the petition submitted to be examined, tried and duly terminated by the Constitutional Court. Terms of legal status (*legal standing*) covers the formal requirements as specified in the legislation, as well as material requirements in the form of loss of rights or authority with the enactment of the legislation in question.

The term *legal standing* means certain party makes claim or obtain legal power over certain rights or obligations. To have *legal standing*, particular person or party must meet two kinds of elements, personal and material elements (Asshiddiqie, 2006). Personal element is the requirements related to the ability to take legal actions in the form of a legal relationship and the ability to influence the judicial procedures through a claim or appeal. Material element is associated with a particular event or fact of law set out in legislation.

Related to *legal standing* of proposal of judicial review in Constitutional Court, then it is stipulated in Article 51 paragraph (1) Number 24 of 2003, "Petitioners are those who consider the rights and/or authority constitutionally impaired by the enactment of legislation, including:

- a. Individual Indonesian citizens
- b. Customary law community unit along still alive and in accordance with the development of society and the principles of the Unitary Republic of Indonesia stipulated in the legislation;
- c. Public or private legal entity; or
- d. State institutions.

Thus, requirements of applicants in applying for *Judicial Review* to the Constitutional Court are:

1. One of the four groups of subjects such laws as stipulated in Article 51 paragraph (1) of Law No. 24, 2003.

2. The legal subjects have the rights or powers as stipulated in the Constitution of the Republic of Indonesia of 1945.
3. Rights or authorities concerned have been harmed or violated by the enactment of legislation or a part of the legislation in question.
4. The losses have a causal relationship with the enactment of the legislation in question.
5. If the petition is concerned is granted, then the loss of constitutionality is concerned can be recovered by the cancellation of the law (Termorshuizen, Supriyanto-Breur, & Djohan-Lapian, 1999)

If all five of these requirements can be met cumulatively, the applicant is certain to have *legal standing* to appeal the case to the Constitutional Court.

Filing a petition against the law in the Constitutional Court is not the same as filing a claim to the ordinary courts. While Constitutional Court has the position as one of the power holders of Justice, the material issues examined and decided upon the Constitutional Court related to the elements constitutional and political elements. In addition, in a lawsuit in court, someone will expect compensation or specific action on the part of his opponent, whereas if the petition for a law, whereby if the judge had granted his filing, then those who make these laws cannot be held accountable, but he may be requested to perform certain actions of rights recovery or remedies against the constitutionality of a person authorized, by declaring that the whole or part of the material from a law that tested otherwise have no legal force. One of the requirements to meet the criteria of legal status (*legal standing*) to apply for *Judicial Review* in the Constitutional Court is to comply with the provisions of Article 51 paragraph (1) of Act Number 24 of 2003, concerning those who harmed the rights of a person or group particular person or entity is one of the four groups referred to in Article 51 paragraph (1) of Act Number 24 of 2003, the subject must show sufficient evidence, such as identity cards, identity cards, passports, birth certificates, or other documents deemed necessary. Regarding the state institutions also need to be proven with legal documents are legitimate.

If an application is submitted by the parties that do not have a legal status (*legal standing*), then the judge will decide that the request for the applicant cannot be accepted. This ruling means that the trial has not yet entered authority constitutionally impaired by the enactment of legislation, including:

1. Individual Indonesian citizens
2. Customary law community unit along still alive and in accordance with the development of

society and the principles of the Unitary Republic of Indonesia stipulated in the legislation;

3. Public or private legal entity; or
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